IN THE HIGH COURT OF DELHI AT NEW DELHI

COMPANY JURISDICTION

COMPANY PETITION NO.73 OF 2006

DATE OF DECISION: 9th October, 2006

In the matter of The Companies Act, 1956;

under Sections 391 to 394 of the Companies Act, 1956;

Scheme of Amalgamation of :

M/s Karamchand Appliances Pvt. Ltd. ...Transferor Company No. 1.

M/s Roshni Appliances Pvt. Ltd. ....Transferor Company No. 2.

With

M/s S.C. Johnson Products Pvt. Ltd. ....Transferee Company.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be

allowed to see the judgment? -

2. To be referred to the Reporter or not ? Yes

3. Whether the judgment should be reported in the Digest ? Yes

SANJIV KHANNA, J :

1. This petition under Sections 391 (2) -393 of the Companies Act, 1956 (hereinafter referred to as Act) has been filed by M/s Karamchand Appliances Pvt. Ltd. (hereinafter referred to as transferor company No.1) and M/s Roshni Appliances Pvt. Ltd. (hereinafter referred to as transferor company no.2) and M/s S.C.Johnson Products Pvt. Ltd. (hereinafter referred to as transferee company).
2. The registered offices of the two transferor companies and the transferee company are located in Delhi, within the jurisdiction of this Court.
3. It is stated in the petition that no proceedings under Sections 235-251 of the Act are pending against the transferor company and the transferee company.
4. The two transferor companies and transferee company had earlier filed CA(M) Nos.12/2006 and 74/2006. The said applications were disposed of vide order dated 16.1.2006 and the requirement to hold and convene

meetings of the shareholders of the two transferor companies and the transferee company for the purpose of considering and approving the proposed scheme of amalgamation was dispensed with. Meetings of the creditors of the transferor companies and the transferee company were also dispensed with. However, direction was given that meeting of the unsecured creditors of the transferor company no.1 will be held. In terms of the said directions meeting of the unsecured creditors of the transferor company no.1 was held on 20.2.2006. The Chairperson appointed by this Court for the purpose of the said meeting has submitted his report dated 27.2.2006. As per the report, 23 unsecured creditors were present in the said meeting and all of them have unanimously approved the proposed scheme of amalgamation.

5. After filing of the present petition, citations were directed to be published. Affidavit of service has been filed stating that citations have been duly published.

6. Notices were also issued to the O.L. and the Regional Director (NR). The O.L. has filed his report and stated that no objections/complaints had been been received by him to the proposed scheme of amalgamation. He has further stated that on the basis of information submitted by the two transferor companies, he is of the view that the affairs of the said companies do not appear to have been conducted in

a manner which is prejudicial to the interest of it's members and public interest.

7. The Regional Director has filed his report, inter alia, raising two objections. It is firstly submitted that the authorized share capital of the two transferor companies cannot be clubbed and added to the authorized share capital of the transferee company without following the prescribed procedure under the Act and without payment of the stamp duty and fee to the ROC.

8. The aforesaid objection raised by the Regional Director was considered by this Court in Hotline Hol Celdings Pvt. Ltd. and Ors. (2005) 127 Comp. Cases 165 and was overruled. It has been held that in a case of complete merger, authorized share capital of the transferor company can be added to the authorized share capital of the transferee company and no stamp duty and fee is required to be paid in such cases. Following the above decision, the above objection raised by the Regional Director (NR) is rejected.

9. The second objection raised by the Regional Director (NR) is that the proposed scheme of amalgamation requires reduction of capital and payment to the preferential shareholder out of the security premium account. It is stated that this can be permitted and allowed after

following the prescribed procedure under Sections 100-101 of the Act in accordance with the provisions of Section 78 of the aforesaid Act.

10. The matter was heard at length on 6th September, 2006. However, before the order was signed, Rule 85 of the Companies (Court) Rules, 1959 (hereinafter referred to as the Rules) came to my notice and, therefore, the matter was listed for directions on 12th September, 2006.

11. Learned counsel for the petitioner companies has drawn my attention to the object and purpose behind Sections 100-104 read with Rule 85 of the Rules. It is submitted that the underlying basis and purpose is to protect the interest of the creditors and the shareholders concerned who may suffer or have adverse effect or likely to have adverse effect on account of reduction of share capital. Reliance in support of the submissions has been placed on the judgment of the Andhra Pradesh High Court in the case of Novopan India Limited; In Re: G.V.K. Hotels Limited, (1997) 88 Company Cases 596, judgment of Madras High Court in the case of Asian Investments Limited and others (1992) 73 Company Cases 835 and judgment of Calcutta High Court in the case of Mcleod Russel (India) Ltd. (1997) 4 Company Law Journal 60.

12. It was brought to the notice of the learned counsel for the petitioner companies that this Court had dispensed with the requirement to issue notice to unsecured creditors of the transferor company no.1 to whom

Rs.5,000/- or less was payable. Learned counsel for the petitioners, however, pointed out that this was in terms of the directions issued by this Court in order dated 16th January, 2006 passed in CA(M) No. 12/2006 and CA No. 74/2006. It was further stated that only Rs.1,18,000/- was due and payable to the said unsecured creditors of the transferor company no.1. It was also stated that the other unsecured creditors to whom the transferor company no.1 owed more than Rs.11 crores had approved the scheme. It was submitted that the transferee company was/is the holding company of the transferor company No. 1 and transferor company No. 1 in turn was/is the holding company of transferor company No. 2.

13. My attention was also drawn to clauses 9.1, 10.A1 and 10.B1 of the scheme which deal with reduction of paid up share capital of the transferee company.

14. Rule 85 of the Rules stipulates that where the proposed compromise or arrangement involves reduction of capital, the procedure prescribed under the Act and the said Rules relating to reduction of capital and the requirements of the Act and the Rules shall be complied with before compromise or arrangement relating to reduction of capital is sanctioned.

15. In the case of Novopan (supra) the scheme envisaged reduction of share capital to offset existing losses. It was specifically noticed that the proposed reduction of share capital did not involve either diminution of liability in respect of unpaid share capital or payment to any shareholder of any paid up share capital. The proposal for reduction was under clause (b) of sub-section (1) of Section 100 of the Act. The decision will support the case of the petitioner to the extent the scheme envisages reduction of share capital to offset losses and falls under clause (b) of Section 100 of the Act. However, the said decision is of no assistance to the petitioners insofar as the scheme envisages payment to the preferential shareholder of the paid up share capital. Similarly, in the case of Asian Investments (supra) the scheme provided for extinction of share capital of the transferee company as some shares in the transferee company were held by the transferor company. Pursuant to merger under the scheme, shares held by the transferor company in the transferee company could not have been transferred to the transferee company. The transferee company could not be owner of its own shares. In these circumstances, it was held that Rule 85 of the Rules was not applicable and, therefore, Sections 101 and 102 of the Act were also not applicable. The scheme itself was held to be covered by Section 391 and 392 of the Act and a case of amalgamation simplicitor,

where entire assets and liabilities of the transferor company were transferred to the transferee company and there was no release of any asset. The issue before the Calcutta High Court in the case of Mcleod Russel (supra) was also substantially different from the controversy before this court. In the said case the scheme provided for cancellation of investment made by the transferor company in the equity share capital of the transferee company. It was held that where a proposed scheme of amalgamation stipulated merger of transferor company with the identity of the transferee company, Rule 85 had no application as the transferor company stands transferred as a whole to the transferee company.

16. The relevant provisions have been considered in depth and detail by Gujarat High Court in the case of Maneckchowk and Ahmedabad Manufacturing Company Ltd. (1970) 40 Company Cases 819. Reference was made to definition of the term “scheme” in Section 390 of the Act and it was held that a scheme could also envisage modification and/or reduction of share capital. With reference to Rule 85 of the Rules it was observed that a scheme could certainly envisage re-organisation of share capital as a part of the scheme itself but in cases where the scheme envisaged reduction of share capital Rule 85 had to be given full effect to. Therefore, Company Court can sanction “re-organisation” of

share capital in a scheme, without following the procedure for reduction of share capital as envisaged under Section 100 to 104 of the Act. However in cases of reduction of share capital, Rule 85 was applicable and accordingly sections 100 to 104 of the Act were applicable. The court also made a distinction between mandatory provisions and directory provisions and it was held that a scheme which envisaged reduction of share capital to set off losses was different and distinct from a scheme which involved either diminution of liability in respect of unpaid share capital or payment to any shareholder of the paid up share capital. Reduction envisaged by cancellation of the paid up share capital that was lost or unrepresented by available assets was treated as distinct category under Section 100 of the Act. In such cases it was not mandatory to follow the procedure prescribed in Section 101(2) of Act, unless directed by the court. However, the court held that where proposal involved reduction or diminution in liability in respect of unpaid share capital or payment to any shareholder of any paid up share capital, the procedure under Section 101 of the Act was mandatory.

17. Following the above decisions, in so far as the scheme envisages setting off and reduction of security premium account by writing off debit balance/losses in the profit and loss account of the transferee company amounting to Rs. 1,189,019,000/-, Rule 85 does not come into

operation if one follows the reasoning of Andhra Pradesh High Court in Novopan India (supra). Even if one follows the reasoning given in Maneckchowk and Ahmedabad Manufacturing (supra) I do not find any impediment in not sanctioning the scheme to this extent as Rs. 1,189,019,000/- is to be written off towards debit balance/losses in the profit and loss account with correspondence reduction in the security premium account. In the case of transferee company, all the shareholders and the creditors have unilaterally approved the said scheme and thus there is substantial compliance with Sections 100 to 104 of the Act.

18. This leaves us with the second question whether repayment of share premium to the preference shareholders of the transferee company with reduction of the security premium account requires compliance with provision of Section 100 to 104 of the Act in view of Rule 85. As discussed above, the scheme envisages transfer of paid up share capital premium to the preference shareholder of the transferee company. Rule 85 read with provisions of Section 100 to 104 are mandatory and must be complied with.

19. In the present case the transferee company has only two shareholders. The said shareholders have given their written consent to the proposed scheme of amalgamation including reduction of the share capital by

payment from security premium account. Similarly, the transferee company has only two unsecured creditors and no secured creditors. Two unsecured creditors are group companies of the transferee company. The unsecured creditors have also unilaterally given their consent letters and no objection certificates to the proposed scheme of amalgamation. In these circumstances, I am exercising my discretion under Section 101(3) of the Act and I do not think it is necessary and required that the procedure mentioned in Section 101(2) should be followed. Passing of special resolution and calling for meeting of the two unsecured creditors of the transferee company would be an empty and meaningless formality. I may state here that strictly speaking creditors of the two transferor companies are not concerned with and do not fall within the four corners of Section 101(2) of the Act. The creditors of the transferor companies do not become creditors of the transferee company, till the scheme is sanctioned and duly approved. Till then they continue to be creditors of the transferor companies and their rights as creditors are protected and governed by Section 391-392 of the Act. The creditors of the transferor companies have approved the scheme under Section 391 and 392 of the Act.

20. A word of caution, this court has not examined and gone into the question whether the transferee company is permitted and allowed to

repay and repatriate the share premium paid for purchase of the preference shares. No such objection has been raised by the Central Government in its reply/response. This issue is left open. In case there is any restriction and/or no such approval is granted or can be granted for repayment and repatriation of the share premium, this portion of the scheme shall stand nullified and cancelled. This, however, will not affect the other portion of the scheme which has been sanctioned. It will be open to the parties and others to move an appropriate application before this court for modification or clarification if required.

21. Having regard to the averments made in the petition, the material placed on record and the affidavit filed and reply of the Regional Director and the Official Liquidator, the petition is allowed subject to the above observations. I am satisfied that the prayer made in the petition deserves to be allowed. I do not find any legal impediment not to sanction the scheme of amalgamation. Hence subject to the above observations sanction is hereby granted to the above mentioned scheme of amalgamation under Sections 391-394 of the Act. The transferee company will comply with statutory requirements. Certified copy of this order will be filed with the Registrar of Companies within five weeks from the date of the order. Upon the scheme becoming

effective from the appointed date, the transferor companies shall stand dissolved without being wound up.

22. The petition is disposed of.

DASTI.

(SANJIV KHANNA)

JUDGE

October 9, 2006

rn/vkr/mv